Supreme Court, U.S.
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No. 94-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS H. EGAN,
Petitioner,

VS.

WELLS FARGO ALARM SERVICES,
also known as BAKER PROTECTIVE SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May Petitioner, a union employee whose employment terms are governed by a union contract, maintain a wrongful discharge action for alleged "whistle-blowing," when Missouri case law limits such actions to at-will employees and where Respondent's defense would entail interpretation of the collective bargaining agreement?

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STATEMENT OF THE CASE

Petitioner has omitted a factual matter which is significant in the context of this Petition. Respondent asserted as a defense that Petitioner's employment was terminated pursuant to the terms of a collective bargaining agreement with the International Brotherhood of Electrical Workers Local 1 because Petitioner was absent from work for more than twelve (12) months and lost his seniority rights which "is the equivalent of termination" (Memorandum, A.3-4).

SUMMARY OF ARGUMENT

Missouri applies the at-will employment doctrine to persons who work without a contract for a definite period of time. The only exception to the at-will rule is a "public policy" exception where the employee is seriously engaged in a form of "whistle blowing" with respect to his employer. Petitioner had been employed pursuant to the terms of a labor contract freely negotiated between Respondent and his Union. Petitioner was terminated according to the terms of that agreement. Notwithstanding the fact of the contract, Petitioner asserts that he is entitled to maintain this action pursuant to the exception to the at-will doctrine because of the pre-emption doctrine. The Petition for Writ of Certiorari should be denied because the decision of the United States Court of Appeals for the Eighth Circuit applied Missouri case law which is so structured as to avoid conflicts with federal labor policy. Missouri limits "public policy" claims to persons employed "at-will." By excluding those employed pursuant to a contract, state law obviates the need for a state court to interpret a labor contract. In this case, Petitioner was terminated by operation of contract and any court hearing *this* case would have to interpret Article VIII (A.17-18) and possibly Article XXI (A.30) of the applicable collective bargaining agreement in the course of decision-making in a manner that would be contrary to this Court's rulings in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

ARGUMENT

Missouri follows the doctrine of employment at-will which permits the termination of an employee working without benefit of contract "for a definite period of time,"[1] with or without cause, and without risk of liability for wrongful discharge. *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. banc 1985); and *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc 1988). A narrow exception to this doctrine has been carved out by Missouri Appellate Courts, but not its Supreme Court, where an employee has complied with, or refused an employer's request not to comply with, federal or state law. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985); and *Petersimes v. Crane Co.*, 835 S.W.2d 514 (Mo. App. 1992). This is generally referred to as the "public policy" exception. *Boyle, supra*, at 871. This exception exists, in large measure, because at-will employees do not "have job security through union or individually negotiated contracts." *Boyle, supra*, at 878.

Because the "public policy" exception is an exception to the at-will employment rule, it is hardly surprising that employees with contracts do not fall within its protection. *Komm v. McFliker*, 662 F. Supp. 924, 925 (W.D. Mo. 1987); and *Luethans v. Washington University*, 838 S.W.2d 117, 120 (Mo. App. 1992).

Petitioner would have this Court restructure Missouri's public policy exception to the at-will employment rule because his contract is a collective bargaining agreement. In *Lividas v. Bradshaw*, 114 S. Ct. 2068 (1994) this Court stated:

> "In labor pre-emption cases, as in others under the Supremacy Clause, our office is not to pass judgment on the

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[1] *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. banc 1981), *cert. denied*, 454 U.S. 1084 (1981); and *McCloskey v. Eagleton*, 789 S.W.2d 518, 519 (Mo. App. 1990).

> reasonableness of state policy, *see, e.g., Golden State I,* 475 U.S. 608 (1986) (city's desire to remain 'neutral' in labor dispute does not determine pre-emption). It is instead to decide if a state rule conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the federal law. *Brown v. Hotel Employees,* 468 U.S. 491, 501 (1984)," 114 S.Ct at 2076.

As opposed to an obstacle the public policy exception is in harmony with *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985) which found that a state tort action which involved interpretation of a collective bargaining agreement was pre-empted because of the necessity of preserving the contractually established arbitration procedure preferred by federal labor policy as a means of interpreting the contract. Because Respondent terminated Petitioner pursuant to the terms of the union contract, Article VIII, Section 2,[2] whereby seniority is automatically terminated after one (1) year of absence, no court may resolve the claim without resolving Respondent's rights in the context of Petitioner's absence and the seniority clause of the contract. Missouri's exception to the at-will doctrine does not require a court to interpret the collective bargaining agreement, and it is that interpretation factor which is the litmus test for federal pre-emption of a state tort action. *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399 (1988). Precisely because no court could possible decide this case without resolving the issue of Petitioner's termination as an automatic operation of the seniority clause, it is Petitioner's tort claim which is pre-empted, not Missouri's exception to the rule.

As this Court states in *Lividas, supra*: "We do not suggest here that the NLRA automatically defeats all state action taking any account of the collective bargaining process or every state law distinguishing union represented employees from others." 114

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[2] A.17-18.

S. Ct. at 2083. Clearly, the National Labor Relations Act has not expressly pre-empted the entire field of labor relations as that Act has no express pre-emption provision. 29 U.S.C. 151 *et seq.* and *see also Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, n. 14 (1987). Where a subject is primarily and historically a matter of local concern, pre-emption cannot be inferred on the theory of dominant federal interest. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 719 (1985). As *Fort Halifax* plainly taught:

> "Absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees."

Inasmuch as employment at-will is a circumstance virtually never associated with a collective bargaining agreement, that subject is beyond the pale of pre-emption.

Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239 (1994) offers no support to Petitioner. Not only does *Norris* focus upon a state statute creating a right of action, as opposed to a judicially created exception to a common law doctrine, the facts in *Norris* did not require contract interpretation. The contract here is the "only source" for Respondent's right/obligation to terminate Petitioner. Petitioner could have sought recovery through the grievance and arbitration procedure[3] and, possibly pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The only primary sources for competent interpretation of

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[3] Art. XIII, A.24-26.

the agreement would be an arbitrator selected pursuant to the grievance procedure[4] or a federal court in the proper factual setting. *See Litton Financial Printing Division v. NLRB,* 111 S.Ct. 2215 (1991). Inasmuch as Petitioner did not utilize the former, and had no right to the latter, because there was no allegation that there existed a breach of the duty of fair representation, Petitioner cannot now foreclose Respondent's right to have the applicable provisions of the collective bargaining agreement interpreted by an arbitrator. The purpose of federal pre-emption is,

> " . . . to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement,' *Lueck,* 471 U.S. at 211 . . ." *Lividas, supra,* 114 S. Ct. at 2077.

Now to find that pre-emption demands that state courts interpret labor contracts by holding that a protection afforded at-will employees must also be granted union employees stands the entire concept of pre-emption on edge and undermines the very reason why Missouri courts created an exception to at-will employment.

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[4] Ibid.

CONCLUSION

Employment at-will is a subject matter exclusively regulated by state law. Missouri has, thus far, structured a limited exception to the at-will doctrine for "public policy" claims. That exception does not conflict with federal labor law or policy because the at-will doctrine is inapplicable to a union employee working pursuant to a union contract. Pre-emption is not an appropriate vehicle to micro manage a small exception to the at-will employment doctrine which in and of itself is historically a matter of exclusive state regulation. For this and other reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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